

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD VOGT,

Plaintiff,

v.

CITY OF ORINDA and EMMANUEL URSU,

Defendants.

No. C 11-2595 CW

ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS

Defendants City of Orinda (the City) and Emmanuel Ursu move to dismiss Plaintiff Edward Vogt's First Amended Complaint (1AC) on the ground that he has failed to state a claim upon which relief may be granted. Plaintiff has filed an opposition and Defendants have filed a reply. The matter was taken under submission and decided on the papers. Having considered all the papers filed by the parties, the Court grants the motion to dismiss.

BACKGROUND

On December 6, 2011, the Court issued an Order Granting Motion to Dismiss and Granting Leave to Amend (Docket No. 29), in which it held that Plaintiff had failed to allege an equal protection claim brought by a "class of one" because he had alleged no fact to support his status as a "class of one" or that his right to equal protection was violated by Defendants. The Court explained that, to state such a claim, Plaintiff must plead

1 facts showing that he was treated differently than others who were
2 similarly situated to him, without a rational basis for the
3 discrepancy. The Court also explained that, to state a claim for
4 a violation of his right to substantive due process based on the
5 deprivation of a property right, Plaintiff must allege that
6 Defendants' actions lacked any substantial relation to public
7 health, safety or the general welfare. The Court also held that,
8 to proceed against the City, Plaintiff must allege facts tending
9 to show that his rights were violated as a result of an identified
10 City policy or custom and, to state a claim against Ursu
11 personally, Plaintiff must plead that he violated Plaintiff's
12 clearly established constitutional rights.
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14 The following facts are from Plaintiff's 1AC and the
15 documents of which the Court takes judicial notice.¹ In 2001,
16 Plaintiff applied to have a "simple" lot line adjustment between
17 his two adjoining properties located in Orinda. Defendants
18 refused to perform what was, under California lot line adjustment
19 law, a simple administrative approval. Instead, Defendants
20 engaged in delaying tactics such as requesting architect's and
21 surveyor's drawings, a full topographic survey and map, analysis
22 of the kind of houses that might be built on the lots, photos of
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25 ¹ The Court grants Defendants' and Plaintiff's requests for
26 judicial notice. See Fed. R. Civ. P. 12(d); Mir v. Little Co.,
27 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice
28 of matters of public record without converting motion to dismiss
into motion for summary judgment).

1 "story poles" to indicate potential house floors and gables, and
2 indemnification in the event the City was sued for its approval of
3 the lot line adjustment.

4 Plaintiff alleges that the requirements imposed by the City
5 were in violation of California law. In 2006, Plaintiff sued the
6 City in state court for a writ of mandate to require the City to
7 obey the law. In 2008, the state court issued its decision
8 holding that Plaintiff had submitted overwhelming "evidence to
9 support [his] contention that the [Orinda City] Council sought to
10 impose conditions on the granting of the lot line adjustment in
11 direct contravention of Gov't Code section 66412, subdivision
12 (d).² The Respondent's assertion that Petitioner 'voluntarily'
13 took steps to obtain the water and sewer permits is disingenuous
14 at best." Vogt v. City of Orinda, Superior Court of Contra Costa
15 County, Case No. 6-1494, Peremptory Writ of Mandate, September 3,
16 2008. The court ordered the City to limit its review and approval
17 of Plaintiff's lot line application to whether it conformed to the
18 local general plan or any applicable specific plan, zoning or
19 building ordinances. Id. Plaintiff alleges that, two years after
20 the court issued this order, Defendants still had not approved the
21 lot line adjustment and that the Council approved the request only
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26 ² California Government Code section 66412(d) exempts lot
27 line adjustments of four and fewer existing adjoining parcels from
28 complying with certain domestic water and sewer requirements.

1 after he threatened to sue the individuals on the Council for
2 contempt of court.

3 Defendants submit a copy of Orinda City Council Resolution
4 24-10, an appeal of the Planning Commission's adoption of the
5 negative declaration for approval of Plaintiff's lot line
6 adjustment, which indicates that the Orinda City Council approved
7 the lot line adjustment after preparing a detailed initial study
8 and issuing a negative declaration in compliance with the
9 California Environmental Quality Act, California Public Resources
10 Code section 21000 et seq.

11
12 Plaintiff alleges that Defendants' requirements were
13 arbitrary and unreasonable and were directed at Plaintiff but not
14 at other people in the City who had, over the years, similarly
15 asked for lot line adjustments to their properties. Plaintiff
16 alleges that "these examples are in the files of Orinda and will
17 be fully revealed by later subpoena." Plaintiff alleges that the
18 fact that the City approved his request after he threatened to sue
19 the City Council shows "that there was no substantial relation
20 between defendants' land use actions and the public health, safety
21 or general welfare."

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23 Plaintiff also alleges that the City has a policy to keep its
24 "semi-rural" character and this policy is the basis for its
25 "denial of Plaintiff's constitutional and statutory rights to use
26 and improve his property reasonably, without arbitrary constraints
27 and bogus requirements."
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1 Plaintiff alleges that Ursu is the head of the City's
2 planning department and is responsible for the enormous delay,
3 expense, and arbitrary requirements that the City imposed on
4 Plaintiff for the past ten years. He alleges that Ursu enforces
5 the City's "semi-urban" policy, even though the policy causes the
6 City to violate federal constitutional and statutory laws.
7 Specifically, Plaintiff alleges that Ursu refused to certify
8 Plaintiff's papers from the City Council so that they could be
9 recorded because Plaintiff's surveyor's stamp was out of date on
10 the old papers but, when the surveyor said that his stamp was not
11 out of date, Ursu certified the papers. Plaintiff also alleges
12 that Ursu demanded that Plaintiff write a check for thousands of
13 dollars to the City for an illegal fee, but Plaintiff paid it
14 because he was anxious to record the lot line adjustment.
15 Defendants submit that the fee was a mandatory filing fee required
16 by the California Department of Fish and Game.
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19 LEGAL STANDARD

20 A complaint must contain a "short and plain statement of the
21 claim showing that the pleader is entitled to relief." Fed. R.
22 Civ. P. 8(a). When considering a motion to dismiss under Rule
23 12(b)(6) for failure to state a claim, dismissal is appropriate
24 only when the complaint does not give the defendant fair notice of
25 a legally cognizable claim and the grounds on which it rests.
26 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
27 considering whether the complaint is sufficient to state a claim,
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1 the court will take all material allegations as true and construe
2 them in the light most favorable to the plaintiff. NL Indus.,
3 Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
4 principle is inapplicable to legal conclusions; "threadbare
5 recitals of the elements of a cause of action, supported by mere
6 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
7 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550
8 U.S. at 555).

10 DISCUSSION

11 Defendants argue that, although Plaintiff's IAC sets forth
12 the elements of each claim, it is legally insufficient because the
13 claims are not supported with factual allegations.

14 I. Equal Protection of a Class of One

15 Equal protection claims brought by a "class of one" can be
16 stated when the plaintiff alleges that he or she has been
17 intentionally treated differently from others similarly situated
18 and that there is no rational basis for the difference in
19 treatment. Village of Willowbrook v. Olech, 528 U.S. 562, 564
20 (2000). In Olech, the plaintiff's allegations that the Village
21 intentionally demanded a thirty-three foot easement as a condition
22 of connecting her property to the municipal water supply when the
23 Village required only a fifteen-foot easement from other similarly
24 situated property owners, that the Village's demand was irrational
25 and wholly arbitrary, and that the Village ultimately connected
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1 her property after receiving a fifteen-foot easement, were
2 sufficient to state an equal protection claim. Id. at 565.

3 Plaintiff has not alleged any facts showing Defendants
4 treated other people who are situated similarly to him
5 differently. To do this, Plaintiff must allege that Defendants
6 granted other similar requests for lot line adjustments in a
7 shorter time and with fewer requirements than in Plaintiff's case.
8 Plaintiff merely alleges that the names of the people who have
9 been treated differently from him are in the City's files and he
10 will obtain them when discovery commences. However, under Rule 8
11 of the Federal Rules of Civil Procedure, Plaintiff must allege
12 facts sufficient to show that he is entitled to relief. See Elan
13 Microelectronics Corp. v. Apple, Inc., 2009 WL 2972374, *1 (N.D.
14 Cal.) (Rule 8 does not unlock the doors of discovery for a
15 plaintiff armed with nothing more than conclusions).
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18 In fact, allegations in other sections of the IAC support the
19 contrary conclusion. For instance, Plaintiff alleges that the
20 policy to keep the City semi-rural "is the basis of Orinda's
21 reputation as being extraordinarily difficult for permits and
22 building of any kind, and it is the basis for Orinda's denial of
23 plaintiff's constitutional and statutory rights to use and improve
24 his property reasonably." According to this allegation, the City
25 treats all requests for permits to improve property similarly to
26 the way it treated Plaintiff's. Furthermore, the newspaper
27 articles Plaintiff submits in support of his opposition are
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1 written by property owners who also have had to wait a long time
2 to receive City approval for permits to improve their property.
3 Again, this shows that the City treats people attempting to
4 improve their property similarly to Plaintiff.

5 Defendants' motion to dismiss this claim is granted. Because
6 Plaintiff has been granted leave to amend this claim and has
7 failed to do so, it is dismissed without leave to amend.

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9 II. Substantive Due Process Claim

10 Defendants argue that Plaintiff's conclusory allegations
11 cannot meet the requirements of a substantive due process claim.

12 To state a substantive due process claim challenging a land
13 use action, a plaintiff must allege that the city's delays in
14 processing the plaintiff's application did not further any
15 legitimate government interest. North Pacifica LLC v. City of
16 Pacifica, 526 F.3d 478, 485 (9th Cir. 2008); Shanks v. Dressel,
17 540 F.3d 1082, 1088 (9th Cir. 2008). "The Supreme Court has 'long
18 eschewed . . . heightened [means-ends] scrutiny when addressing
19 substantive due process challenges to government regulation' that
20 does not impinge on fundamental rights." Id. When government
21 action "like a discrete permitting decision is at issue, only
22 'egregious official conduct can be said to be arbitrary in the
23 constitutional sense;' it must amount to an abuse of power lacking
24 any 'reasonable justification in the service of a legitimate
25 governmental objective.'" Id. Official decisions that are based
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1 on erroneous legal interpretations are not necessarily
2 constitutionally arbitrary. Id. at 1089.

3 In Shanks, the plaintiffs alleged that the city improperly
4 granted a building permit to a third party, which caused their
5 property to decrease in value. Id. The court held that the
6 granting of a building permit to a third party was a routine, if
7 perhaps unwise or legally erroneous decision, which fell short of
8 being constitutionally arbitrary. Id. The court noted that there
9 was no suggestion of a sudden change in course, malice, bias,
10 pretext or anything more than a lack of due care on the city's
11 part. Id. at 1089. The court also noted that it was "at least
12 fairly debatable that Spokane rationally furthered its legitimate
13 interest in facilitating residential housing in a residential
14 neighborhood by issuing a building permit to the Dressels. When
15 reviewing a substantive due process challenge, this suffices; our
16 task is not to balance 'the public interest supporting the
17 government action against the severity of the private
18 deprivation.'" Id.

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21 Plaintiff's allegations are, as a matter of law, insufficient
22 to state a claim that Defendants violated his substantive due
23 process rights. Like the plaintiffs in Shanks, Plaintiff alleges
24 that Defendants made a routine decision regarding approval of his
25 request for a lot line adjustment. Even if Defendants'
26 application of the law was legally erroneous, under Shanks, this
27 does not rise to the level of a due process violation.
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1 Furthermore, Plaintiff himself alleges that Defendants were
2 motivated by a desire to maintain Orinda's semi-rural character,
3 thus providing a rational governmental interest to support their
4 actions. As stated in Shanks, it is not the Court's task, in a
5 substantive due process claim, to balance the public interest
6 supporting the government action against the severity of the
7 private deprivation. It is sufficient that there is a legitimate
8 governmental interest that is rationally related to Defendants'
9 action. And, as in Shanks, Plaintiff does not suggest that
10 Defendants acted out of malice, bias, pretext or anything more
11 than a lack of due care.

13 Therefore, Defendants' motion to dismiss this claim is
14 granted. Because Plaintiff has been granted leave to amend this
15 claim and has failed to remedy its deficiencies, dismissal is
16 without leave to amend.

18 Because Plaintiff has not alleged facts sufficient to state
19 claims of constitutional violations against Defendants, the Court
20 does not address Defendants' arguments that these claims must be
21 dismissed against the City for not stating a policy or practice
22 and against Ursu for not alleging unconstitutional conduct.
23 Furthermore, because Plaintiff has not sufficiently alleged
24 constitutional violations, his request for an injunction "ordering
25 Defendants to cease obstructing my legal requests and to act in
26 good faith toward me and to treat me in the future legally and
27 reasonably and like any other property owner" is denied.
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CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Plaintiff's 1AC is granted. Dismissal is without leave to amend.

IT IS SO ORDERED.

Dated: 5/2/2012


CLAUDIA WILKEN
United States District Judge